

ESTTA Tracking number: **ESTTA710265**

Filing date: **11/23/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92060849
Party	Defendant Sunkiss Thermoreactors Inc.
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Date	11/23/2015
Attachments	Motion Quash Reply Final.112315.X.pdf(139804 bytes) Quash Reply_Exhibit 4_TSI Corp record.pdf(1180198 bytes) Quash Reply_Exhibit 5_SMR Business Card.pdf(2243097 bytes) Quash Reply_Exhibit 6_FINAM verification page.pdf(13298 bytes) 0-Cert Svc Quash Reply 112315.pdf(64906 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

FINAM,)	
)	
Petitioner,)	
)	Cancellation No. 92/060,849
v.)	
)	Reg. No. 1,200,333
Sunkiss Thermoreactors, Inc.,)	
)	Mark: SUNKISS
Registrant.)	
<hr style="width: 45%; margin-left: 0;"/>		

**REGISTRANT'S REPLY IN SUPPORT OF MOTION TO
QUASH NOTICE OF RULE 30(b)(6) DEPOSITION UPON
WRITTEN QUESTIONS AND FOR PROTECTIVE ORDER**

The Registrant, Sunkiss Thermoreactors, Inc. ("Registrant" or "TSI"), submits this reply in support of its Motion to Quash Notice of Rule 30(b)(6) Deposition Upon Written Questions And For Protective Order (the "Motion to Quash") and in response to the Petitioner's Opposition to Registrant's Motion to Quash ("Petitioner's Opposition"). (Dkts. 15 and 19, respectively).

I. PETITIONER'S NOTICE OF WRITTEN DEPOSITION IS UNTIMELY

Discovery in this proceeding started on June 4, 2015. *See* Dkts. 6 and 7. Indeed, the Petitioner issued its first round of discovery requests of 31 interrogatories, 77 requests for documents, and 33 requests for admission on June 16, 2015. *See* Dkt. 15, p. 2. The Petitioner then waited for nearly seven weeks after TSI's responses to issue its Notice of Rule 30(b)(6) Deposition Upon Written Questions ("Notice of Written Deposition").

It is undisputed that TBMP 404.07(b) requires that written depositions be both noticed and taken during the discovery period and that the Petitioner's Notice of Written Deposition could not be taken during the set discovery period. As noted in TBMP 404.07(b), since written depositions are to be taken during the discovery period, "[i]t is recommended that a party, which desires to take a discovery deposition on written questions, initiate the procedure early in its

discovery period.” The Petitioner did **not** initiate the procedure early in the discovery period but, rather, waited until the last weeks of the period, more than three months after the start of discovery and nearly two months after the Petitioner received from TSI the discovery responses to which the Petitioner now asserts its written questions are directed. *See* Dkt. 19, p. 3.

The Petitioner inaccurately asserts that TSI is requiring service of notices of deposition prior to service of “any discovery responses and when, as a result, much of the subject-matter which forms the basis for Petitioner’s direct examination questions was unknown.” *Id.* First, per the TBMP, the Petitioner should have served its notice early in discovery – not two months after TSI served the purported “necessary” discovery responses. Second, the false ring of the Petitioner’s argument is emphasized by looking at the examination questions in the Notice of Written Deposition. For the majority of its questions, the Petitioner had either not served any discovery requests or had only just served its related discovery requests. *See* Dkt. 15, pp. 4-5.

While a party may move, for good cause, to extend any of the time periods set forth in 37 C.F.R. § 2.124(d)(1), the Petitioner never made such a motion.¹ *See* TBMP 404.07(e). Moreover, the Petitioner has not shown good cause for any extension in its Opposition. The Petitioner’s decision to serve its Notice of Written Deposition at the end of the discovery period, coupled with its harassing discovery stance and ever-shifting theories in this case, reveals that the Notice of Written Deposition was an afterthought.

II. PETITIONER’S DEPOSITION QUESTIONS ARE UNREASONABLY CUMULATIVE AND DUPLICATIVE, IRRELEVANT, AND HARASSING

The discovery process before the Board may be liberal, but it is not an unfettered free-for-all. While a party “may obtain discovery regarding any nonprivileged matter that is relevant

¹ Nor did the Board extend any time periods of its own initiative.

to [its] claim or defense,” the Board “must limit the frequency or extent of discovery” when such discovery is “unreasonably cumulative or duplicative, or can be obtained from another source that is more convenient, less burdensome, or less expensive.” FED. R. CIV. P. 26(b)(1) and (2). The Petitioner’s Notice of Written Deposition seeks to push the meaning of relevance and the propriety of discovery past their proper bounds, leading to an unreasonably cumulative and duplicative deposition. Moreover, the information sought has already been, or can be, obtained from another source that is more convenient, less burdensome, or less expensive.

A. Petitioner’s Unreasonably Cumulative and Duplicative Questions

The Petitioner argues that its direct examination questions 159 through 166 are “narrowly tailored to elicit further information pertaining to Registrant’s response to Petitioner’s Request for Admission No. 8,” which “only ask[ed] Registrant to admit or deny” license agreements.

Dkt. 19, p. 5. Petitioner’s argument fails to address TSI’s response to this admission request:

The Registrant and American Industrial Ovens share a common owner, who is also the Director of both companies, Mr. Daniel Ayotte. While there are no written agreements between the Registrant and American Industrial Ovens, there is an oral understanding and implied license between the companies allowing American Industrial Ovens to use the Registrant’s Mark in the United States. Therefore, the Registrant ADMITS this request.

Dkt. 15, Composite Exhibit 2, response to request for admission number 8.

The Petitioner argues its direct examination question 26 is not duplicative in light of TSI’s previous discovery responses because “none of the previous requests seeks this particular information.” Dkt. 19, pp. 5-6. The Petitioner is splitting hairs. The only conceivable purpose of question 26 is to identify persons with knowledge on TSI’s use of the Mark and/or the nature of TSI’s business – which were both addressed in TSI’s interrogatory responses. *See* Dkt. 15, Composite Exhibit 2, responses to Interrogatory Nos. 10 and 11.

It must also be noted that the Petitioner's allegation that "Registrant responded to all of Petitioner's Interrogatories with only document production" is false. Dkt. 19, p. 6. For example, TSI provided written responses to Interrogatory Nos. 1, 3, 5, 9-12, 17, 19, 20, 22-25, 27, and 31. *See* Dkt. 15, Composite Exhibit 2, Registrant's Responses to Interrogatories.²

FED. R. CIV. P. 26 (b)(2) specifically sets forth that discovery otherwise permitted may be limited if the sought discovery "can be obtained from some other source that is more convenient, less burdensome, or less expensive." Should the Petitioner have any remaining relevant questions that are not unreasonably duplicative or cumulative, it would be more convenient, less burdensome, and less expensive for all Parties if this discovery was sought by other means.

B. Petitioner's Irrelevant Questions

The Petitioner argues that its line of questioning cannot be irrelevant because the questions are based on documents produced by TSI. *See* Dkt. 19, pp. 6-7. In making this argument the Petitioner is focused on its direct examination questions 68 through 110 and 126 through 158. The Petitioner's argument is a red herring. In the disputed questions the Petitioner does not seek answers to questions relevant to this proceeding but instead pushes for unrelated information that could only conceivably be useful for a breach of contract claim – which is not pled here. For example, questions 68 through 110 and 126 through 158 ask questions such as (1) why did TSI enter into agreements that predate TSI's ownership of the Mark, (2) what are the meanings of terms in these agreements that are not related to trademarks, and (3) did TSI comply with the general provisions of these agreements that were not specifically for or limited to trademarks? These questions also concern agreements between two third parties and efforts to

² It was actually the Petitioner who only responded to TSI's interrogatories by relying on FED. R. CIV. P. 33.

obtain legal conclusions on the 2010 addendum concerning a non-trademark provision of the 2008 license agreement (which pre-dated TSI's 2009 ownership of the Mark). These questions are not relevant to the Petitioner's allegation of abandonment. Moreover, the Petitioner's "related" line of questioning in its Notice of Written Deposition is directed to the Petitioner's fundamentally flawed theory that an assignment is "negated" once the assignee amends an earlier license agreement with the assignor. As discussed in TSI's opposition to Petitioner's motion to amend, this theory is nonsensical and has no support in the law or the terms of the agreements to which the Petitioner so desperately clings. *See* Dkt. 13, pp. 5-7.

The Petitioner argues that "license agreements pertaining to the challenged mark are highly relevant." Dkt. 19, p. 7. This may be true when the license agreements in question are from the registrant (i.e., the registrant is the licensor). But that is not the fact pattern of this proceeding. Here, the registrant, TSI, was a licensee to the Mark (among other things) prior to becoming the owner of the Mark. Then, **after** TSI became the owner of the Mark, that same earlier license was amended solely in regard to provisions wholly unrelated to trademarks. At the time of this later amendment, the original licensor was no longer the owner of the Mark and had no standing with which to grant a license to TSI (who, of course, owned the Mark at that time and clearly could not "re-license" the mark it already owned).

Any existence of trademark rights at the time of 2008 license agreement cannot be answered by TSI, as TSI was not the owner of the Mark at that time. The mere fact that TSI agreed to a later, unrelated addendum to the 2008 license agreement does not magically mean TSI suddenly gained any knowledge of the Mark prior to its acquisition of ownership rights to the Mark. The Petitioner's argument that, since TSI "reaffirmed" the 2008 license agreement in 2010 it somehow creates relevance for the 2008 license agreement, simply defies logic.

It is clear, as explained in more detail *infra* and in the Motion to Quash, that the bulk of the Petitioner's direct examination questions is directed to harass and overly burden TSI and, at best, are being used to support the Petitioner's ongoing fishing expedition for some reason to support its petition to cancel or to attempt to bolster its footing regarding a variety of allegations made in Canada against TSI. *See also* Registrant's Motion for Sanction Under FED. R. CIV. P. 11, 37 C.F.R. § 11.18 and TBMP 527.02 (Dkt. 21).

III. THE SPECIFIC QUESTIONS IDENTIFIED BY TSI SHOULD BE QUASHED

TSI responds as follows to the Petitioner's efforts to cobble together relevance for direct examination questions 21-25, 28, 30-35, 45-49, 54, 57-61, 68-110, 126-58, 188-98, and 273-84.

Questions 21-25: These questions are directed to when, why, and by whom TSI was incorporated, the identity of all owners of TSI, and each owner's interest in TSI. This information is available through less burdensome means and is primarily in the public realm. The Petitioner argues these questions "could reveal additional individuals with knowledge of" TSI's use of the Mark (*see* Dkt. 19, p. 8) but fails to mention that TSI has already provided (1) a full response to Interrogatory Nos. 10, 11, and 12 seeking the identities of persons with knowledge of use of the Mark, the nature of TSI's business, dates and circumstances surrounding the creation, adoption, and/or acquisition of the Mark, and (2) corporate statements of information for TSI which identifies its date of registration, shareholders and officers. *See* Dkt. 15, Composite Exhibit 2, and Exhibit 4, attached hereto.

Question 28: The fact that TSI is the owner of the Mark for space heaters does not forbid TSI from selling other products. All that matters for purposes of this proceeding is whether TSI is still selling space heaters under the mark SUNKISS. TSI has provided evidence

showing its use of the SUNKISS mark for space heaters. Any other products or product lines possibly offered by TSI are simply not relevant.

Questions 30-35: The Petitioner's explanation for these questions, that they "could illicit an answer that there is no current manufacturer," ignores the fact that TSI has already provided the following discovery responses: "The Registrant is the manufacturer and supplier of the space heaters sold and offered in the United States under the Registrant's Mark" (Response to Interrogatory No. 9), "All Products offered or sold by Ayotte Techno-Gaz Inc. [and by American Industrial Ovens] under or otherwise bearing the Registrant's Mark are acquired from the Registrant" (Response to Interrogatory Nos. 19 and 22), and "The Registrant manufactures space heaters in Canada for sale under the Registrant's Mark in the United States" (Response to Interrogatory No. 24). Dkt. 15, Composite Exhibit 2. Moreover, the answers could not "evidence Registrant's lack of use of the mark in association with space heaters," since TSI has provided evidence of use. *See supra*.

Questions 45-49: The Petitioner's explanation for these questions does not account for the actual questions themselves, the answers to which could only, in a best-case scenario for the Petitioner, reveal that TSI at some point contemplated selling or actually did sell space heaters "under a mark other than SUNKISS" and what the "other mark" is, when used, and what its sales were. However, since a trademark registrant is permitted to use more than one mark at any given time, none of these answers would "reveal" an "intention to abandon the SUNKISS mark." Dkt. 19, p. 8. *See In re Callaway Golf Co.*, 2001 TTAB LEXIS 599, *17, n.8 (T.T.A.B. 2001) ("more than one mark may be used in connection with a single product"); *Unsworth Transp. Int'l, Inc. v. UTI Worldwide, Inc.*, 2005 TTAB LEXIS 35, *9 (T.T.A.B. 2005) ("It is well settled, however, that a party may use more than one mark or trade name"); *Suntrek Tours, Ltd. v. Am.*

Pioneer Tours, Ltd., 1999 TTAB LEXIS 301, *10 (T.T.A.B. 1999); and *Cluett, Peabody & Co. v. Bond Stores, Inc.*, 170 U.S.P.Q. 294, 295-96 (T.T.A.B. 1971). Moreover, as noted *supra*, TSI has already provided evidence of continuous use of the Mark.

Question 54: TSI has provided information on the location and extent of sales of space heaters under the Mark. Therefore, the Petitioner's "reasoning" behind question 54 is moot.

Questions 57-61: Questions 57 through 61 are directed to the history of the relationship between TSI and Sunkiss SAS. In 2009 when TSI became the owner of the Mark, the trademark license provisions in the 2008 license was void, and the 2010 addendum to that license (solely regarding updated definitions of products mentioned in the 2008 license and silent on any trademark related issue) did not magically revive Sunkiss SAS's ability to license the Mark to TSI (the owner). *See* Dkt. 13. When considering all the relevant agreements and their language, the Petitioner is asserting that the history of TSI and Sunkiss SAS is relevant because (1) prior to TSI's ownership of the mark, Sunkiss SAS licensed the mark to TSI, and (2) after TSI became the owner of the Mark, the two parties contracted another non-trademark agreement. Neither of these supports a finding of relevance, particularly as the Petitioner does not assert that the Mark was abandoned when the assignment to TSI was executed. Rather, the Petitioner has included these questions, among others, in an effort to get TSI to make a statement or some other admission to assist in the Petitioner and/or its related entities in its various other attacks (including breach of contract) against TSI in Canada. *See* Dkt. 22.

Questions 68-110, 126-58: *See supra*.

Questions 188-98: The Petitioner's support for these questions is simply that TSI has invoices that include a mark ("SUNSPOT") other than the Mark at issue. However, as noted *supra*, TSI is permitted to use more than one mark at any given time. *See In re Callaway Golf*

Co., 2001 TTAB LEXIS 599 at *17, n.8; *Unsworth Transp. Int'l, Inc.*, 2005 TTAB LEXIS 35 at *9; *Suntrek Tours, Ltd.*, 1999 TTAB LEXIS 301 at *10; and *Cluett, Peabody & Co.*, 170 U.S.P.Q. at 295-96. Moreover, the Petitioner's argument does not even make legal sense, since an invoice cannot be used as a specimen to show use of a mark for products. TMEP 904.04(b).

Questions 273-84: The Petitioner's explanation for these questions is almost offensive. The Petitioner is related to the entities identified in direct examination questions 273 through 284, specifically, Sunkiss Societe par Actions Simplifiee and Les Radiants SMR, Inc. ("SMR"). Mr. Michel Charmes is President of both these entities **and** the General Manager of the Petitioner. *See* Dkt. 21, p. 2 and exhibits thereto, and Exhibits 5 and 6, attached hereto. The Petitioner seeks to use these questions in an attempt to bolster its (or its related companies') other attacks on TSI, primarily in Canada. *See* Dkt. 21, pp. 3-6 and 12-13, and exhibits thereto.

IV. A PROTECTIVE ORDER IS NEEDED BECAUSE THE PETITIONER'S NOTICE OF WRITTEN DEPOSITION ABUSES THE DISCOVERY PROCESS

"Although the rule contemplates liberal discovery, the right to discovery is not unlimited. Both the Trademark Rules and the Federal Rules of Civil Procedure grant the Board discretion to manage the discovery process in order to balance the requesting party's need for information against any injury that may result from discovery abuse." *Phillies v. Phila. Consol. Holding Corp.*, 107 U.S.P.Q.2d 2149, 2152 (T.T.A.B. 2013) (quoting *FMR Corp. v. Alliant Partners*, 51 U.S.P.Q.2d 1759, 1761 (T.T.A.B. 1999)). "While it is a general rule that parties involved in an adversary proceeding are entitled to seek discovery as they may deem necessary to help them prepare for trial, it is not the practice of the Board to permit unlimited discovery to the point of harassment and oppressiveness." *Id.* at 2152.

The Petitioner has issued 33 requests for admission, 46 interrogatories, and 89 requests for production in addition to its 284 direct examination questions in its Notice of Written Deposition. The Petitioner pled only abandonment as its cause of action, and throughout this proceeding the Petitioner has been shifting its bases for that cause of action and failing to provide any real responses to TSI's very focused discovery requests on the bases for the Petitioner's claim. *See* Dkt. 13, p. 3, and Dkt. 21, pp. 3-6. Simultaneously, the Petitioner and its related entities related have brought multiple other attacks on TSI in Canada, including for a breach of contract concerning the license and its addendum on which many of the Petitioner's current novel theories rest. *See* Dkt. 15, pp. 4-5; *see also* Dkt. 21, pp. 4-6. The Petitioner's Notice of Written Deposition, particularly when coupled with the Petitioner's other actions and discovery tactics, reveals that the Petitioner is using the discovery process for purposes of harassment, oppressiveness, and as an attempt to further its (or its related entities') position in other matters.³

V. CONCLUSION

Therefore, and as set forth in its motion, TSI requests its Motion to Quash be granted.

Respectfully submitted,

November 23, 2015
Date

/s/ Rebecca J. Stempien Coyle
Rebecca J. Stempien Coyle
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Attorneys for Registrant

³ Petitioner cites to portions of the TBMP regarding protective orders but omits the portion stating that "there are certain situations (such as, for example, when a request for discovery constitutes clear harassment) . . . in which a party may properly respond to a request for discovery by filing a motion for a protective order." TBMP 526; *see also* TBMP 410.

EXHIBIT 4

Cancellation No. 92/060,849

FINAM v. Sunkiss Thermoreactors, Inc.

Registrant's Reply in Support of Motion to Quash

Look up an enterprise in the Register

Statement of information of a legal person in the Enterprise Register

Information as of 2015-05-15 15:24:42

Statement of information

Identification of the enterprise

Québec enterprise number (NEQ/QEN)	1162615505
Name	THERMOREACTEURS SUNKISS INC.
Version of the name in another language	SUNKISS THERMOREACTORS INC.

Domicile address

Address	2223 Route 131 N Notre-Dame de Lourdes Québec J0K1K0 Canada
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Elected domicile address

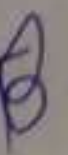
Address	No address
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Registration

Registration date	2004-11-17
Status	Registered
Status updated	2004-11-17
End of existence date	No end of existence date is declared in the Register.

Legal form



 19-10-15

Legal form
Date of constitution
Constituting regime
Current regime

Business corporation or company
2004-11-16 Constitution
QUEBEC: Companies Act Part 1A, CQLR,
C-38
QUEBEC: Business Corporations Act (CQLR, C-38,
31.1)

Updates

Statement of information updated	2014-09-22
Date of last annual update declaration	2014-09-22 2013
End date of the filing period of the 2015 annual update return	2016-07-01
End date of the filing period of the 2014 annual update return	2015-07-01

Bankruptcy

The enterprise is not bankrupt.

Amalgamation and division

No amalgamation or division has been declared.

Continuation and other transformation

No continuation or other transformation has been declared.

Liquidation or dissolution

No intention of liquidation or dissolution has been declared.

Economic activities and number of employees

1st sector of activity

Economic Activity Code (EAC)	3999
Activity	Other manufactured products industries
Details (optional)	MANUFACTURING/MARKETING OF REFRACTORY SUPPORTS, ENERGY TRANSMITTERS

2nd sector of activity

No information has been declared.

Number of employees

19-10-15

Number of employees in Québec
1 to 5

Unanimous agreement, shareholders, directors, officers and attorney

Shareholders

First shareholder

The first shareholder is not the majority shareholder.
Name
Address

9140-3543 QUEBEC INC.
180 rue Arboit L'Assomption Québec J5W4P5
Canada

Second shareholder

Name
Address

9211-5534 Québec Inc
2223 Boul. Barrette Notre-Dame-de-Lourdes Québec
J0K1K0 Canada

Unanimous shareholder agreement

No unanimous shareholder agreement exists.

List of directors

Name
Office start date
Office end date
Current position
Address

AYOTTE, DANIEL

President
176 Rue Larochelle L'Assomption Québec J5W1C3
Canada

Officers who are non-members of the Board of Directors

Name
Current position
Address

ROY, BRIGITTE
Secretary
176 Rue Larochelle L'Assomption Québec
J5W1C3 Canada

Attorney

No attorney has been declared.

Administrators of the property of others

19-10-15

No administrator of the property of others has been declared.

Establishments

No establishment has been declared.

Documents currently being processed

No document is currently being processed by the Enterprise Registrar.

Index of documents

Documents retained

Document type	Filing date in the Register
2013 ANNUAL UPDATE DECLARATION	2014-09-22
Current update declaration	2014-02-20
2012 ANNUAL UPDATE DECLARATION	2013-06-28
Current update declaration	2013-05-14
2011 annual declaration	2012-07-03
2010 annual declaration	2011-07-04
2009 statement and declaration of information	2010-03-31
Amending declaration	2010-03-19
Amending declaration	2009-10-16
2008 statement and declaration of information	2009-07-21
2007 statement and declaration of information	2008-05-21
2006 annual declaration	2008-02-04
2005 annual declaration	2005-12-20
Initial declaration	2005-02-21
Certificate of constitution	2004-11-17

Index of names

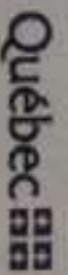
Index of names updated 2004-11-16

Name

Other name	Versions of the name in another language	Name declaration date	Name withdrawal declaration	Status
THERMOREACTEURS SUNKISS INC.	SUNKISS THERMOREACTORS INC.	2004-11-16		In force

Other names used in Québec

No other name used in Québec has been declared.



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19-10-15

EXHIBIT 5

Cancellation No. 92/060,849

FINAM v. Sunkiss Thermoreactors, Inc.

Registrant's Reply in Support of Motion to Quash



*North American Division of
the Sunkiss Matherm Group*

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President | North America

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EXHIBIT 6

Cancellation No. 92/060,849

FINAM v. Sunkiss Thermoreactors, Inc.

Registrant's Reply in Support of Motion to Quash

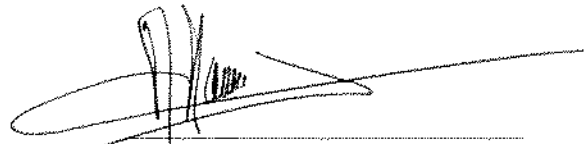
VERIFICATION

I, Michel Charmes, in my capacity as General Manager of FINAM, have read the foregoing Responses to Registrant's First Set of Interrogatories. I reserve the right to make changes in or additions to any of these responses if it appears at any time that errors or omissions have been made or if more accurate or complete information becomes available. Subject to these limitations, these Responses are true to the best of my present knowledge, information, and belief.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

2015-09-14

Date



Michel Charmes
General Manager
FINAM

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing REGISTRANT'S REPLY IN SUPPORT OF MOTION TO QUASH NOTICE OF RULE 30(b)(6) DEPOSITION UPON WRITTEN QUESTIONS AND FOR PROTECTIVE ORDER, with Exhibits, were served this date via First Class mail, postage prepaid, on the Petitioner's attorneys as follows:

Ms. Kristen A. Mogavero
Mr. Jess M. Collen
COLLEN IP INTELLECTUAL PROPERTY LAW PC
The Holyoke-Manhattan Building
80 South Highland Avenue
Ossining, New York 10562
kmogavero@collenip.com

November 23, 2015
Date

/s/ Rebecca J. Stempien Coyle
Rebecca J. Stempien Coyle